AND
BRIEFS.

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Supreme Court of the United States

ENDREW F., PETITIONER

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR NATIONAL DISABILITY RIGHTS NETWORK, ET AL. AS AMICI CURIAE SUPPORTING PETITIONER

SAMUEL R. BAGENSTOS
625 S. State St.
Ann Arbor, Michigan 48109

ARLENE B. MAYERSON
DISABILITY RIGHTS EDUCATION & DEFENSE FUND, INC.
3075 Adeline St., Ste. 210
Berkeley, California 94703

RONALD M. HAGER
NATIONAL DISABILITY RIGHTS NETWORK
820 1st St., N.E., Ste. 740
Washington, D.C. 20002

MARC A. HEARRON
Counsel of Record
LINDA A. ARNSBARGER
BRYAN J. LEITCH
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-1663
MHearron@mofo.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE

Amici curiae are forty-four organizations that are made up of, represent, and advocate for the rights of Americans with disabilities.[1] For decades, amici have been involved in administrative proceedings, litigation, and policy advocacy to promote the civil rights of people with disabilities, including the educational rights of disabled students.

In particular, in the nearly thirty-five years since this Court's decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), amici have supported a series of legislative changes, in and out of the educational sphere, in which Congress has expanded the civil rights of people with disabilities. The central piece of legislation marking the shift to robust guarantees of disability rights is, of course, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq.

Congress also adopted a series of amendments to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq.—most notably in 1997 and 2004—which brought that statute in line with the emerging civil rights of people with disabilities. Those amendments strengthened the obligation to provide a free appropriate public education (FAPE) to all children with disabilities. They reject

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[1] No party or counsel for a party authored this brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed letters with the Clerk granting blanket consent to the filing of amicus briefs.

the notion that, as the Tenth Circuit held, schools can satisfy the statute simply by providing "merely * * * 'more than *de minimis*'" educational benefit to students with disabilities. Pet. App. 16a (citation omitted). The amendments to the IDEA, together with Congress's inclusion of students with disabilities in the national commitment to standards-based education under the Elementary and Secondary Education Act (ESEA), 20 U.S.C. § 6301 et seq., have been part of a comprehensive congressional effort to "[i]nclud[e] individuals with disabilities among people who count in composing 'We the People.'" *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring).

This is the first case since *Rowley* in which the Court will squarely address the substantive content of a State's obligation under the IDEA to ensure a "free appropriate public education" for students with disabilities. Amici submit this brief to assist the Court in deciding the question presented on the basis of all of the relevant legal developments since its decision in *Rowley*.

Amici curiae are as follows:

The **National Disability Rights Network** (NDRN) is the nonprofit membership association of Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies in the United States. P&A/CAP agencies are authorized under federal law to represent and advocate for, and investigate abuse and neglect of, individuals with disabilities. The P&A/CAP system comprises the Nation's largest provider of legal-based advocacy services for persons with disabilities.

The **Advocacy Institute** was established in 2000 as a not-for-profit organization. In its fifteen years of operation, the Institute has provided close to 100 hours of web-based training for advocates and attorneys working on behalf of children with disabilities and their families, as well as extensive information and resources on many IDEA-related issues.

Advocates for Justice and Education, Inc. (AJE) is the federally designated Parent Training Information Center for the District of Columbia pursuant to 20 U.S.C. § 1482. As its mission, AJE seeks to empower families, youth, and the community to be effective advocates to ensure that children and youth, particularly those who have special needs, receive access to appropriate education and health services.

African Caribbean American Parents of Children with Disabilities, Inc. (AFCAMP) is a federally funded Community Parent Resource Center pursuant to 20 U.S.C. § 1482. Located in Hartford, Connecticut, AFCAMP's mission is to educate, empower, and engage parents and the community to improve quality of life for children with special needs and others at risk of education inequity or system involvement.

The **American Association on Intellectual and Developmental Disabilities** (AAIDD) (formerly named the American Association on Mental Retardation), founded in 1876, is the Nation's oldest and largest organization of professionals in the field of intellectual disability. Through its professional journals, conferences, and book publishing, AAIDD

works diligently to advance scientific understanding of intellectual disability.

The **American Diabetes Association** (Association) is a nationwide, nonprofit, voluntary health organization founded in 1940 made up of persons with diabetes, healthcare professionals who treat persons with diabetes, research scientists, and other concerned individuals. The Association's mission is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

The **American Foundation for the Blind** (AFB), the Nation's leading nonprofit champion for people with vision loss to which Helen Keller devoted more than four decades of her extraordinary life, advocates for the rights, needs, and independence of children, working-age adults, and seniors who are blind, visually impaired, or deafblind.

The Arc of the United States (The Arc), founded in 1950, is the Nation's largest community-based organization of and for people with intellectual and developmental disabilities (I/DD). Through its legal advocacy and public policy work, The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community throughout their lifetimes.

The Arc of Colorado is the Colorado state affiliate of The Arc of the United States and is dedicated

to supporting and advocating for people with I/DD throughout the state of Colorado.

The Arc Michigan is a Michigan organization that has worked for more than sixty years to ensure that people with developmental disabilities are valued in order that they and their families can participate fully in and contribute to their community.

The **Association of University Centers on Disabilities** is a nonprofit membership association of 130 university centers and programs in each of the fifty States and six Territories. AUCD members conduct research, create innovative programs, prepare professionals to serve and support people with disabilities and their families, and disseminate information about best practices in disability programming, including educational instruction from preschool to postsecondary education.

The **Autism Society of America** is the Nation's leading grassroots autism organization. It was founded in 1965 and exists to improve the lives of all affected by autism spectrum disorder (ASD). It does this by increasing public awareness and helping with the day-to-day issues faced by people on the spectrum and their families. Through its strong national network of affiliates, it has been a thought leader on numerous pieces of state and federal legislation.

The **Autistic Self Advocacy Network** (ASAN) is a national, private, nonprofit organization run by and for individuals on the autism spectrum. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities.

The **Center for Public Representation** is a public-interest legal-advocacy organization that has advocated for the rights of and represented people with disabilities for more than forty years. The Center has litigated systemic cases on behalf of people with disabilities in more than twenty States and authored amicus briefs regarding the constitutional and statutory rights of persons with disabilities.

The **Civil Rights Education and Enforcement Center** (CREEC) is a Denver-based national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC promotes this mission through education, outreach, and individual and impact litigation.

Disability Rights California is a nonprofit California organization that protects the human, legal, and service rights of adults and children with disabilities. It is the California agency designated under state and federal law to represent the rights of persons with disabilities.

The **Disability Studies Program of the University of California at Berkeley** works to understand the meaning and effects of disability socially, legally, politically, and culturally. Our research and teaching seek to eliminate barriers to full social inclusion and advance the civil and human rights of people with disabilities.

Easterseals provides opportunities for more than 1.5 million people of all ages with a range of disabilities to achieve their full potential. From child-development centers to physical rehabilitation, job

training, and caregiver support, Easterseals offers assistance to people with disabilities, caregivers, veterans, and seniors through a network of seventy-five affiliates.

The **Education Law Center–PA** (ELC) is a nonprofit legal-advocacy organization dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through legal representation, impact litigation, trainings, and policy advocacy, ELC advances the rights of vulnerable children, including children with disabilities, children living in poverty, children of color, children in the foster-care and juvenile-justice systems, English-language learners, LGBTQ students, and children experiencing homelessness.

The **Equal Justice Society** (EJS) is a national legal organization focused on restoring constitutional safeguards against discrimination. EJS works to restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, by combining legal advocacy, outreach and coalition building, and education through effective messaging and communication strategies.

Exceptional Children's Assistance Center (ECAC) is North Carolina's federally funded Parent Training and Information Center pursuant to 20 U.S.C. § 1482. ECAC's mission is committed to improving the lives and education of *all* children through a special emphasis on children with disabilities and special healthcare needs.

The **Faculty Coalition for Disability Rights** is a 501c(4) organization advocating for disability rights at the University of California, Berkeley.

With membership drawn from all faculty ranks, the Coalition's mission is to advance the civil rights of people with disabilities on our campus so that they may enjoy full and equal participation in all aspects of the university.

The **Federation for Children with Special Needs** (FCSN) is the federally funded Parent Training and Information Center for Massachusetts. FCSN's mission is to empower and support families and inform and involve professionals and others interested in the healthy development and education of children and youth, with the goal of ensuring that all children and youth, including those with disabilities, receive the services needed to become productive, contributing members of their communities and our society.

The **Learning Disabilities Association of America**, with a membership of over 5,000 individuals with learning disabilities, their families, and educators and researchers, is a consumer-led and -driven organization. Its vision and mission are to have learning disabilities universally understood and effectively addressed, create opportunities for success for all individuals affected by learning disabilities, and reduce the incidence of learning disabilities in future generations.

The **Learning Disabilities Association of Hawai'i** is a nonprofit organization serving children and their families across the Hawaiian Islands, and the U.S.-affiliated Pacific Islands. It is our mission to enhance educational, work, and life opportunities for children and youth with, or at risk of, disabilities by empowering them and their families through

screening, identification, information, training, and mentoring, and by public outreach and advocacy.

The **Long Island Advocacy Center (LIAC)** is a nonprofit organization that represents the legal rights of students and individuals with disabilities. LIAC is familiar with the special education challenges faced by children with disabilities and their families and the teaching approaches proven effective to enable children with disabilities to achieve State-level standards and have the opportunity to graduate high school and go on to college, jobs, and independent living.

Maine Parent Federation's Statewide Parent Information Network (SPIN) is the Parent Training and Information Center, as well as the Family Two Family program for the Health and Rehabilitation Services Administration. It is a nonprofit, grant-funded agency that assists families with children who have special health-care needs to navigate all circumstances they may encounter.

Matrix Parent Network and Resource Center is a Parent Training and Information Center based in Northern California that has provided information, training, and support to families of children with disabilities for more than thirty years.

Mental Health America (MHA), formerly the National Mental Health Association, is a national membership organization composed of individuals with lived experience of mental illnesses and their family members and advocates. The Nation's oldest and leading community-based nonprofit mental health organization, MHA has more than 200 affili-

ates dedicated to improving the mental health of all Americans.

The **National Association of Councils on Developmental Disabilities** (NACDD) is the national nonprofit membership association for the Councils on Developmental Disabilities located in every State and Territory. The Councils are authorized under federal law to engage in advocacy, capacity-building, and systems-change activities that ensure that individuals with developmental disabilities and their families have access to needed community services, individualized supports, and other assistance that promotes self-determination, independence, productivity, and integration and inclusion in community life.

The **National Alliance on Mental Illness** (NAMI) is the Nation's largest grassroots mental-health organization dedicated to building better lives for the millions of Americans affected by mental illness. NAMI advocates for access to services, treatment, support, and research and is steadfast in its commitment to raising awareness and building a community of hope for individuals living with mental illnesses across the lifespan, including students.

The **National Center for Learning Disabilities** (NCLD) is a parent-founded and parent-led nonprofit organization. NCLD's mission is to improve the lives of the one in five children and adults nationwide with learning and attention issues—by empowering parents and young adults and advocating for equal rights and opportunities.

The **National Coalition for Mental Health Recovery** (NCMHR) is a private, nonprofit organiza-

tion comprised of organizations across the country that represent people diagnosed with psychiatric disabilities who are recovering or have recovered from mental-health conditions. NCMHR's mission is to ensure that individuals with psychiatric disabilities have a major voice in the development and implementation of health care, mental health, and social policies at the state and national levels, empowering people to recover and lead a full life in the community.

The **National Council for Independent Living** (NCIL) is America's oldest cross-disability, grassroots organization run by and for people with disabilities. Founded in 1982, NCIL represents thousands of organizations and individuals from every State and Territory, including Centers for Independent Living (CILs), Statewide Independent Living Councils (SILCs), individuals with disabilities, and other organizations that advocate for the rights of people with disabilities throughout the United States.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms.

Founded in 1973, the **National Down Syndrome Congress** is the leading national resource for advocacy, support, and information for anyone touched by or seeking to learn about Down syndrome, from the moment of a prenatal diagnosis through adulthood. A member-sustained, 501(c)(3) organization, repre-

senting the approximately 350,000 people in the United States with Down syndrome and their families, our programs provide individuals with Down syndrome the opportunities and respect they deserve so they can live the life of their choosing.

The **National Federation of the Blind**, a District of Columbia nonprofit corporation, is the oldest and largest membership organization of blind people in the United States, with a membership of over 50,000. Most of the members of the organization are blind people, including many blind children. In addition, we represent a significant population of parents of blind children, some of whom are sighted and some of whom are blind.

Parents Helping Parents (PHP) is a nonprofit, parent-run, family-resource center that has supported families of children with special needs in the Bay Area of California for more than forty years. PHP's mission is to help children and adults with special needs receive the support and services they need to reach their full potential by providing information, training, and resources to build strong families and improve systems of care.

Perkins School for the Blind is a progressive, multi-faceted organization committed to improving the lives of people with blindness and deafblindness all around the world. The Perkins mission is to prepare children and young adults who are blind with the education, confidence, and skills they need to realize their full potential.

Starbridge is one of two federally funded Parent Training and Information Centers in New York State. Starbridge's mission is to partner with people

who have disabilities, their families, and others who support them to realize fulfilling possibilities in education, employment, health, and community living and to transform communities to include everyone.

Statewide Parent Advocacy Network (SPAN) is New Jersey's federally funded Parent Training and Information Center pursuant to 20 U.S.C. § 1482. SPAN's mission is to empower and support families and inform and involve professionals and others interested in the healthy development and education of children and youth, with the goal of ensuring that all children and youth, including those with disabilities, receive the services needed to become productive, contributing members of their communities and our society.

Support for Families is a parent-run nonprofit organization that supports families of children with any kind of disability or special health-care need. Support for Families is familiar with the special education challenges faced by children with disabilities and their families.

Team of Advocates for Special Kids (TASK) is a nonprofit organization that educates and empowers people with disabilities and their families. TASK specializes in special-education support and provide referrals to other agencies when needed. TASK provides information, training, and resources so that parents gain the knowledge and confidence to help themselves and their child.

THRIVE Center is a federally funded Community Parent Resource Center whose mission is to inform and empower all families, particularly low-income and culturally and linguistically diverse fam-

ilies, to be advocates for their children with disabilities, from birth through age twenty-six, and to achieve meaningful participation in their schools and communities.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the nearly thirty-five years since the Court decided *Rowley*, much has changed in the public's—and the law's—understanding of disability. In particular, the passage of the ADA eight years after *Rowley*, along with that statute's subsequent amendments and implementing regulations, have dramatically altered the legal and social status of children and adults with disabilities. No longer are disabled persons "out of sight and out of mind." Congress specifically recognized that people with disabilities should enjoy the right to "fully participate in all aspects of society" and that the law should "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for all disabled people. 42 U.S.C. § 12101(a)(1), (7). As a result of the ADA and other statutes, people with disabilities now ride buses, use the public streets, attend schools and universities, and work in jobs in the mainstream economy. Because education prepares children for future adult roles, educational expectations for disabled children now anticipate higher education, employment, and independent living, rather than a life of dependence and institutionalization.

Since 1990, successive amendments to the IDEA have brought it into line with the post-ADA view of people with disabilities. The IDEA now states that "[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society." 20 U.S.C. § 1400(c)(1). Congress specifically designed the IDEA amendments to "[i]mprov[e] educational results for children with disabilities [as] an essential

element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency." Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17 § 101, 111 Stat. 37, 38 (1997) (new § 601(c)(1)). Over the same period, amendments to the Elementary and Secondary Education Act—amendments that refer to and are referenced by the IDEA—have adopted a model of standards-based education for all students and have specifically included disabled students in that model.

In the decision under review, the Tenth Circuit failed to give due credit to the narrow reach of the *Rowley* decision and failed to consider the changes in the IDEA since the *Rowley* decision. *Rowley* addressed an unusual set of facts, and the Court expressly limited its analysis to those facts. Nothing in the *Rowley* Court's decision purported to adopt a general standard that would apply across the diverse array of fact settings that IDEA cases present. Further, the amendments to the statute since *Rowley* have decisively answered the Court's concern that the IDEA did not set forth a substantive rule governing the education that students with disabilities must receive. Those amendments incorporate the IDEA into the federal statutory policy of standards-based education for all children. They make clear that a school district's educational interventions must seek to enable a child with a disability to meet the standards the district applies to all children, at least absent a specific justification tied to the unique needs of the child. Congress's move to standards-based education, combined with the specific language of the amendments to the IDEA, make the Tenth

Circuit's merely-more-than-*de-minimis* standard untenable.

ARGUMENT

A. *Rowley* Addressed a Narrow, Unusual Fact Setting and Explicitly Declined to Set Forth a Comprehensive FAPE Standard Extending Beyond That Setting

Until the grant of certiorari here, *Rowley* was the only case in which this Court had addressed the substantive content of schools' obligations to provide an "appropriate" education under the IDEA. *Rowley* came before this Court in 1982, just a few years after Congress first required participating States to provide a "free appropriate public education" to disabled children. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 3(c), 89 Stat. 773, 775 (1975).

Because the *Rowley* decision depended crucially on the facts before the Court, it is appropriate to begin by reviewing those facts. Amy Rowley, an elementary school student, was deaf, though she had "minimal residual hearing and [was] an excellent lipreader." *Rowley*, 458 U.S. at 184. She received her education in the regular classroom along with her nondisabled classmates. *See ibid.* Rowley's parents requested that her school provide a sign-language interpreter for her first-grade class. *See ibid.* But the school district instead gave Rowley "an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities." *Ibid.* It also pulled her out of class to "receive instruction from a tutor for the deaf for one hour each day and

from a speech therapist for three hours each week." *Ibid.*

The district court found that, even without a sign-language interpreter, Rowley "perform[ed] better than the average child in her class and [was] advancing easily from grade to grade." *Id.* at 185 (internal quotation marks omitted). The Court also found that Rowley was "'a remarkably well-adjusted child' who interact[ed] and communicate[d] well with her classmates and ha[d] 'developed an extraordinary rapport' with her teachers." *Ibid.* (quoting district court's findings).

The facts of *Rowley* were thus distinctive—and not at all representative of the full range of cases to which the IDEA, by its terms, applies. The case involved a high-achieving student who, although not reaching her full potential, was doing better than most of her nondisabled peers—even without the educational interventions that her parents argued were appropriate. The case also involved a dispute regarding what this Court believed to be a broad question of educational policy left to the States: whether oral instruction or sign language was "the best method for educating the deaf, a question long debated among scholars." *Id.* at 207 n.29.[2]

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[2] Under the current version of the IDEA, schools must, "in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode." 20

(Footnote continued on following page)

This Court explicitly tied its decision in *Rowley* to the distinctive facts of the case. The Court recognized that the statute "requires participating States to educate a wide spectrum of handicapped children," who may have a wide range of different abilities and needs for services and supports. *Id.* at 202. It thus expressly declined to "attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Ibid.* Rather, the Court explicitly "confine[d] [its] analysis" to the situation of "a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system." *Ibid.* In that situation, the Court explained, a student's receipt of good marks and advancement from grade to grade is "an important factor" in determining whether the child has received a free appropriate public education. *Id.* at 203. But, the Court emphasized, even that factor was not conclusive:

> We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a "free appropriate public education." In this case, however, we find Amy's academic progress, when considered with the special services and professional consideration

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U.S.C. § 1414(d)(3)(B)(iv). That provision might well alter the result in *Rowley* if the case arose today, though this case does not present that question.

> accorded by the Furnace Woods school administrators, to be dispositive.

Id. at 203 n.25. The *Rowley* Court could hardly have been clearer: Its holding turned on the case's particular facts.

Because of those distinctive facts, the *Rowley* Court phrased most of its key legal statements in the negative. It rejected various maximalist claims regarding the scope of a State's obligations, but it did not embrace any overarching standard for determining what constitutes an "appropriate" education. The Court observed that Congress had not provided a "comprehensive statutory definition of the phrase 'free appropriate public education.'" *Id.* at 190 n.11. The Court said that "[w]hatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education." *Id.* at 197 n.21; *see also id.* at 200 (rejecting a standard that would have required the State "to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children"). However, the Court also disclaimed any effort to adopt a comprehensive standard for determining when a State had satisfied its obligation to provide a free appropriate public education. *See id.* at 202.

B. Post-*Rowley* Amendments to the IDEA Make Clear That a FAPE Must Provide the Child with the Specialized Instruction and Services Which Allow the Child the Opportunity to Meet the Standards the School District Applies to All Children

In the years since *Rowley*, Congress has not been silent. To the contrary, it has repeatedly amended the IDEA. Where the *Rowley* Court found that Congress had not adopted language providing a "substantive standard prescribing the level of education to be accorded handicapped children," *id.* at 189, the post-*Rowley* amendments have progressively expanded States' substantive obligations under the statute. These amendments make clear that a school district's educational interventions must provide a child with a disability an equal opportunity to meet the standards the district applies to all children. Any deviation from that universal standard must be tied to the unique needs of the child. The Tenth Circuit's merely-more-than-*de-minimis* test therefore falls far short of the requirements that Congress has imposed since *Rowley*.

1. The 1997 amendments

In 1997, fifteen years after *Rowley*, Congress reauthorized the IDEA and made substantial amendments. Many of those amendments focused specifically on enhancing the substantive obligations of school districts to provide a free appropriate public education. Those amendments responded directly to *Rowley* by removing many of the key underpinnings of that decision.

The response to *Rowley* is evident from the new findings Congress added to the text of the IDEA. "Because [they are] included in the [statute's] text," these findings "give[] content to the [statute's] terms." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999). In *Rowley*, the Court had described Congress as having aimed "primarily to make public education available to handicapped children." 458 U.S. at 192. "But in seeking to provide such access to public education," the Court said, "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." *Ibid.* The findings included in the 1997 amendments to the IDEA state that the statute had largely succeeded in achieving that "access" goal. Congress found that "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, this Act has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities." Pub. L. No. 105-17 § 101, 111 Stat. at 39 (new § 601(c)(3)).

But Congress went on to state that the law had not yet achieved its substantive, rather than its access, goals: "However, the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." *Ibid.* (new § 601(c)(4)). Congress also emphasized that since the statute's original enactment in 1975, "[o]ver 20 years of research and experience ha[d] demonstrated that the education of children with disabilities can be made more effective

by," among other things: (1) "having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible" and (2) supporting professional development so that teachers can enable children to "meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children" as well as to "be prepared to lead productive, independent, adult lives, to the maximum extent possible." *Ibid.* (new § 601(c)(5)(A), (E)). By using the phrase "maximum extent possible" *three times* in this provision, Congress clearly communicated its rejection of a minimal benefit standard.

Congress's 1997 findings thus added a new focus on ensuring that disabled children would not just have the chance to go to public school, but that they would have an equal opportunity to participate "in the general curriculum to the maximum extent possible." *Ibid.*[3] Congress underscored its new substantive focus—and its emphasis on high expectations—by amending the statement of purposes that appears in the statutory text. As originally enacted in 1975,

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[3] The legislative history of the 1997 amendments further underscores Congress's effort to move from the goal of access "to the next step of providing special education and related services to children with disabilities: to improve and increase their educational achievement." S. Rep. 105-17, at 2-3 (1997). The Senate Report stated that, with the statute's access goals having been largely achieved, "the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Id.* at 3.

the statute provided that "the purpose of this Act" was "to assure that all handicapped children have available to them * * * a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." Pub. L. No. 94-142 § 3(c), 89 Stat. at 775. The 1997 amendments described the statute's purpose in more robust terms, as aiming "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs *and prepare them for employment and independent living*." Pub. L. No. 105-17 § 101, 111 Stat. at 42 (new § 601(d)(1)(A)) (emphasis added).

The 1997 amendments were not limited to changing the statute's findings and purposes. Congress also made significant changes to the IDEA's operative provisions. These changes, too, responded directly to *Rowley*. Although Congress did not substantively alter the statutory provision that defines "free appropriate public education," *see id.* § 101, 111 Stat. at 44 (new § 602(8)), it made significant changes to the key component of the FAPE definition—the statute's requirements regarding the content of an "individualized education program" (IEP). As *Rowley* recognized, 458 U.S. at 181-82, the IEP requirement gives substance to the statutory command to provide a free appropriate public education. That remains true to this day. *See* 20 U.S.C. § 1401(9) ("free appropriate public education" means special education and related services that, *inter alia*, "are provided in conformity with the individualized education program required under section 1414(d) of this title").

At the time the Court decided *Rowley*, the provision describing what schools must include in an IEP spoke in essentially procedural terms:

> (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Rowley, 458 U.S. at 182 (quoting 20 U.S.C. § 1401(19) (1982)). Based in large part on the limited substantive content of this provision, the Court concluded "that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 206.

The 1997 amendments extensively revised the requirements for what must be included in an IEP. These new requirements specifically focused on ensuring that children with disabilities could participate and progress in the general education curriculum. Thus, instead of merely stating that the IEP should describe "the extent to which" the child "will be able to participate in regular educational programs"—as the former provision did—the new

provision affirmatively required the IEP to provide goals for "meeting the child's needs that result from the child's disability to enable the child *to be involved in and progress in the general curriculum.*" Pub. L. No. 105-17 § 101, 111 Stat. at 84 (new § 614(d)(1)(A)(ii)(I)) (emphasis added). The new provision also required the IEP to set forth "the special education and related services," "supplementary aids and services," and "program modifications or supports" that the school would provide to enable the child "to be involved and progress in the general curriculum." *Ibid.* (new § 614(d)(1)(A)(iii)(II)). Finally, the new provision required that the annual review of a child's IEP "revise[] the IEP as appropriate to address," among other things, "any lack of expected progress toward the annual goals and in the general curriculum." *Id.* § 101, 111 Stat. at 87 (new § 614(d)(4)(A)(ii)(I)).

These changes to the required IEP contents reflect an equal-opportunity approach consistent with the developments in disability law since *Rowley*.[4] The objective is to remove barriers and provide individualized services and supports that enable the student not only to access but to achieve in the general curriculum. And these *substantive* changes mesh perfectly with, and add a layer of content to, the statute's requirements for the IEP *process*. The 1997

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[4] For "an overview of Federal civil rights laws that ensure equal opportunity for people with disabilities," *see* Disability Rights Section, U.S. Dep't of Justice, A Guide to Disability Rights Laws (July 2009), available at https://www.ada.gov/cguide.htm.

amendments set forth the steps involved in this process, starting with comprehensive assessments in all areas of suspected disability, a review of present levels, development of specific goals and services, an examination of any barriers to participation, and an evidence-based system for the evaluation of progress. *See* Pub. L. No. 105-17 § 101, 111 Stat. at 83-85 (new § 614(d)). (The current version of these provisions appears at 20 U.S.C. § 1414(d).) If the IEP services and adaptations are delivered with fidelity, the student has an equal opportunity to achieve in the general curriculum, as well as in other areas such as functional, social, and communication goals. By setting forth the steps to remove barriers and develop individualized services, the amended IEP provisions address the *Rowley* Court's concern about applying an equal opportunity standard by allowing the team to consider the "myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom." *Rowley*, 458 U.S. at 198.

By focusing on participation—and progress—in the general curriculum, these new statutory provisions highlighted Congress's intent to ensure that children with disabilities would receive the same educational opportunities, and be judged by the same educational standards, as nondisabled children. Another amendment Congress made in 1997 underscores this point. That amendment required states to "establish[] goals for the performance of children with disabilities in the State." Pub. L. No. 105-17 § 101, 111 Stat. at 67 (new § 612(a)(16)). Congress provided that those goals must be "consistent, to the maximum extent appropriate, with other goals and

standards for children established by the State." *Id.* (new § 612(a)(16)(A)(ii)). Congress also required States to include children with disabilities in the same "general State and district-wide assessment programs" as nondisabled students, "with appropriate accommodations, where necessary." *Id.* (new § 612(a)(17)). Parent-resource centers and parent-training and information centers were created to help children with disabilities "to meet developmental goals and, to the maximum extent possible, those challenging standards that have been established for all children" and "to be prepared to lead productive independent adult lives, to the maximum extent possible." *Id.* (new § 683(a)(1)-(2)).[5]

2. The 2004 amendments aligned special and general education standards and accountability

In 2004, Congress reauthorized the IDEA once again. And once again, it added provisions that emphasized the robust substantive obligations that it intended to impose on States. Congress retained the statutory findings that the law had largely succeeded in achieving its access goal but that implementation had been impeded by low expectations. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446 § 101, 118 Stat. 2647, 2649 (2004) (codified at 20 U.S.C. § 1400(c)(3), (4)). To address the continuing concerns, Congress amended—

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[5] "[C]hallenging standards" was later amended to "challenging academic achievement goals." 20 U.S.C. §§ 1471(b)(1), 1472(a)(1).

and ratcheted up—its prior finding regarding the high expectations schools should entertain.

Congress now declared that "[a]lmost 30 years of research and experience ha[d] demonstrated that the education of children with disabilities can be made more effective by," among other things, "having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to" meet, "to the maximum extent possible, the challenging expectations that have been established for all children," as well as to "be prepared to lead productive and independent adult lives, to the maximum extent possible." *Ibid.* (codified at 20 U.S.C. § 1400(c)(5)(A)). The use of the words "maximum extent possible" defies a "more than *de minimus*" standard. Congress also found that the education of children with disabilities would be more effective if implementation of the IDEA were "coordinat[ed]" with more general "school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965." *Ibid.* (codified at 20 U.S.C. § 1400(c)(5)(C)). By including children with disabilities in those broader efforts, Congress found, States can "ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent." *Ibid.* To advance this objective, Congress amended the statutory purposes to provide that the free appropriate public education should be designed to prepare students with disabilities "for further education, employment, and independent living." *Id.* § 101, 118 Stat. at 2651 (codified at 20 U.S.C. § 1400(d)(1)(A)).

The Senate Report on the 2004 amendments underscored these findings. The report emphasized that the original IDEA's access goal had largely been achieved: "Today the school house door is open." S. Rep. No. 108-185, at 6 (2003). Thus, the committee explained that its "focus during this reauthorization is on the quality of education children are receiving under the law." *Ibid.* The purpose of the amendments, the committee declared, was "to improve educational results for children with disabilities by * * * [p]roviding a performance-driven framework for accountability." *Id.* at 5.

In their operative provisions, too, the 2004 amendments emphasized that children with disabilities should, to the extent possible, receive the same educational opportunities, and be judged by the same educational standards, as nondisabled children.[6] The amendments required that "[s]tate rules, regulations, and policies * * * support and facilitate local

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[6] These expectations are based on a better understanding of the abilities and potential of students with disabilities. Across the Nation, 8.7% of elementary and secondary students have disabilities. U.S. Dep't of Educ., 38th Annual Report to Congress on the Implementation of the IDEA, Ex. 18 (2016). Of these students, about 90% have the same cognitive abilities as their peers without disabilities and are capable of achieving the same academic standards. Only 7% are classified as intellectually disabled. *Id.* at Ex. 20. And the Centers for Disease Control estimates that only about 38% of students with autism (or 3.2% of students with disabilities) also have intellectual disabilities. Ctrs. for Disease Control & Prevention, Prevalence of Autism Spectrum Disorders (2012). Provided adequate education, many students with intellectual disabilities are going to college, working in the community, and living independently.

educational agency and school-level system improvement designed to enable children with disabilities to meet the challenging State student academic achievement standards." Pub. L. No. 108-446 § 101, 118 Stat. at 2661 (amended § 608(b), codified at 20 U.S.C. § 1407(b)). States are required to establish a "goal of providing full educational opportunity to all children with disabilities." *Id.* § 101, 118 Stat. at 2677 (amended § 612(a)(2), codified at 20 U.S.C. § 1412(a)(2)). The amendments required states to ensure that "[a]ll children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 1111 of the Elementary and Secondary Education Act of 1965, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs." *Id.* (amended § 612(a)(16)(A), codified at 20 U.S.C. § 1412(a)(16)(A)). The amendments required that any alternate assessments for students with disabilities be "aligned with the State's challenging academic content standards and challenging student academic achievement standards." *Id.* § 101, 118 Stat. at 2687 (codified at 20 U.S.C. § 1412(a)(16)(C)(ii)(I)). In addition, they provided that "if the State has adopted alternate academic achievement standards permitted under the regulations promulgated to carry out section 1111(b)(1) of the Elementary and Secondary Education Act of 1965," the alternate assessments must "measure the achievement of children with disabilities against those standards." *Ibid.* (codified at 20 U.S.C. § 1412(a)(16)(C)(ii)(II)).

At the time Congress adopted the 2004 IDEA amendments, the then-current version of the ESEA was the No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (2002). Like the IDEA as amended, NCLB also sought to promote equal educational opportunity. Congress described NCLB's purpose as ensuring "that all children have a fair, *equal*, and significant *opportunity* to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." *Id.* § 101, 115 Stat. at 1439 (adding the then-current version of § 1001) (emphases added). The statute required States to demonstrate that they had "adopted challenging academic content standards and challenging student academic achievement standards," and that those standards would "appl[y] to all schools and children in the State," including disabled students. *Id.* § 101, 115 Stat. at 1444-45 (adding § 1111(b)(1)(A), (B)). To facilitate this goal, it required states to provide for "reasonable adaptations and accommodations for students with disabilities" where that was "necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards." *Id.* § 101, 115 Stat. at 1450-51 (adding § 1111(b)(3)(C)(ix)(II)).

As is evident from the text of the 2004 IDEA amendments, Congress sought in those amendments to "[a]lign[] the IDEA's accountability system with NCLB," an effort Congress thought "essential to ensuring that children with disabilities have the chance to learn and succeed academically." H.R. Rep. No. 108-77, at 83 (2003). The House Report ex-

plained that the "bill carefully aligns the IDEA with the accountability system established under the No Child Left Behind Act to ensure that there is one unified system of accountability for States, local educational agencies, and schools." *Id.* at 96. The report underscored the effort to move beyond the access goal of the original version of the IDEA by emphasizing that the amendments would "enhance[] the IDEA by improving education results for children with disabilities." *Id.* at 130.

In recent amendments to the ESEA, Congress modified the relevant NCLB provisions while retaining their basic structure and the same high academic standards for students with disabilities as for all students. *See* Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802, 1823 (2015) (codified at 20 U.S.C. § 6311(b)). The ESSA continues to require States to adopt "challenging academic content standards and aligned academic achievement standards" that "apply to all public schools and public school students in the State" and "include the same knowledge, skills, and levels of achievement expected of all public school students in the State." 20 U.S.C. § 6311(b)(1)(A), (B). ESSA also requires that these standards be "aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards." *Id.* § 6311(b)(1)(D).

While the statute now permits States, "through a documented and validated standards-setting process," to "adopt alternate academic achievement standards for students with the most significant cognitive disabilities," *id.* § 6311(b)(1)(E)(i), those alter-

nate standards must be "aligned with the challenging State academic content standards," "promote access to the general education curriculum, consistent with the [IDEA]," "reflect professional judgment as to the highest possible standards achievable by such students," be designated in a student's IEP, and be "aligned to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or employment, consistent with the purposes of" the Rehabilitation Act. *Ibid.*

The ESSA specifically amended the IDEA to incorporate these new provisions, thus establishing expectations for state academic standards that are significantly more challenging than prior law. *See id.* § 1412(a)(16)(C). Indeed, ESSA's amendments to IDEA added numerous references to students with disabilities meeting "challenging academic achievement goals that have been established for all children." *E.g., id.* §§ 1454(a)(1)(B), 1454(b)(1)(B)-(C), 1464(b)(2)(A), 1470, 1472(b)(1), 1472(a)(1).

The ESSA also permits a state to "provide for alternate assessments aligned with the challenging State academic standards and alternate academic achievement standards" for "students with the most significant cognitive disabilities," but no more than one percent of the students in the State may receive these alternate assessments. *Id.* § 6311(b)(2)(D)(i), (i)(I). States may provide for these alternate assessments if the State "promotes, *consistent with the Individuals with Disabilities Education Act* * * *, the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum." *Id.* § 6311(b)(2)(D)(i)(III) (em-

phasis added). And the State cannot "preclude a student with the most significant cognitive disabilities who takes an alternate assessment based on alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma." *Id.* § 6311(b)(2)(D)(i)(VII).

After the 1997 and 2004 IDEA amendments, and the amendments to the ESEA that they incorporated by reference, it can no longer be said that the IDEA lacks a "substantive standard prescribing the level of education to be accorded handicapped children." *Rowley*, 458 U.S. at 189. As it has been amended, the IDEA requires States to seek to ensure that children with disabilities have an equal opportunity to "be involved in and make progress in the general education curriculum," *id.* § 1414(d)(1)(A)(i)(II)(aa), and that they can meet the "challenging State academic content standards" applied to all students in the state, *id.* § 1412(a)(16)(C)(ii)(I). Although the statute's current provisions contemplate that some disabled students may need to have proficiency measured using alternate academic achievement standards, the States must promote the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum. *See id.* § 6311(b)(2)(D)(i)(III). These robust substantive requirements instantiate the "high expectations" for disabled children that Congress demanded. *Id.* § 1400(c)(5)(A). They also directly conflict with the minimal "more than *de minimis*" standard applied by the Tenth Circuit.

3. The Department of Education's interpretation

The Department of Education, which administers the IDEA, *see id.* § 1402(a), has adopted regulations that endorse this understanding of the statute's substantive standards. Because the Department has been granted express regulatory authority, *see id.* § 1406, these regulations are entitled to deference. *See City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891-92 (1984).

The Department has repeatedly recognized that Congress's successive enactments have expanded schools' obligations. When it adopted new IDEA regulations in 1999, the Department specifically noted that "the 1997 amendments place greater emphasis on a results-oriented approach related to improving educational results for disabled children than was true under prior law." *Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities*, 64 Fed. Reg. 12,406-01, 12,538 (Mar. 12, 1999). The Department concluded that the IDEA Amendments included "provisions that tie IEP goals and objectives to the regular education curriculum (section 614(d)(1)(A)), establish performance goals and indicators for children with disabilities consistent with those that a State establishes for nondisabled children (section 612(a)(16)), and require the participation of children with disabilities in the same general State and district-wide assessments as nondisabled students (section 612(a)(17))." *Id.* at 12,600-01.

Similarly, when it adopted regulations to implement NCLB, the Department explained that the new statute "sought to correct" the problem of low expectations for disabled students "by requiring each State to develop grade-level academic content and achievement standards that it expects all students—including students with disabilities—to meet, and by holding schools and LEAs responsible for all students meeting those standards." *Title I—Improving the Academic Achievement of the Disadvantaged*, 67 Fed. Reg. 71,710, 71,741 (Dec. 2, 2002). In issuing later NCLB regulations, the Department sought to implement Congressional intent "that schools are held accountable for the educational progress of students with the most significant cognitive disabilities, just as schools are held accountable for the educational results of all other students with disabilities and students without disabilities." *Title I—Improving the Academic Achievement of the Disadvantaged*, 68 Fed. Reg. 68,698, 68,698 (Dec. 9, 2003).

Notably, the Department's regulations specifically incorporate the post-*Rowley* statutory changes into the definition of "special education"—one of the components of the "free appropriate public education" that the IDEA demands that States provide to children with disabilities. *See* 20 U.S.C. § 1401(9). The regulations define "special education" as instruction that, among other things, "adapt[s], as appropriate to the needs of an eligible child," educational "content, methodology, or delivery of instruction," to both "address the unique needs of the child" and "ensure access of the child to the general curriculum, *so that the child can meet the educational standards within*

the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3) (emphasis added).

Under the Department's regulations, a school district must aim to ensure that a disabled child has access to the general curriculum and can meet the educational standards that apply to all students. The Department's regulations define "general education curriculum" as "the same curriculum as for nondisabled children." *Id.* § 300.320(a)(1)(i). Indeed, in adopting regulations implementing the 2004 amendments to the IDEA, the Department explained: "As the term 'general education curriculum' is used throughout the Act and in these regulations, the clear implication is that there is an education curriculum that is applicable to all children and that this curriculum is based on the State's academic content standards." *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46,540-01, 46,579 (Aug. 14, 2006). The Department also emphasized that the ESEA and IDEA are aligned in focusing "on the attainment of State-approved grade-level standards for *all* children." *Id.* at 46,652 (emphasis added). Thus, although aspects of instruction might have to be modified to meet the child's unique needs, the regulations impose a robust substantive requirement on the education that the district must provide to students with disabilities.

As the Department explained its interpretation in 2015, "[r]eading the IDEA and ESEA requirements together, it is incumbent upon States and school districts to ensure that the IEPs of students with disabilities who are being assessed against grade-level academic achievement standards include content and

instruction that gives these students the opportunity to gain the knowledge and skills necessary for them to meet those challenging standards." *Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children With Disabilities*, 80 Fed. Reg. 50,773-01, 50,780 (Aug. 21, 2015). Later that year, the Department elaborated in a guidance document that "an IEP for a child with a disability, regardless of the nature or severity of the disability," must be "designed to give the child access to the general education curriculum based on a State's academic content standards for the grade in which the child is enrolled" and must "include[] instruction and supports that will prepare the child for success in college and careers." Letter from Michael Yudin, Assistant Sec'y & Melody Musgrove, Dir. of Office of Special Educ. Programs, U.S. Dep't of Educ., Office of Special Educ. & Rehab. Servs. (Nov. 16, 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf. The merely-more-than-*de-minimis* standard applied by the Tenth Circuit is flatly inconsistent with the Department's own interpretation.[7]

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[7] The educational methods and technologies involved in teaching children with even the most significant disabilities have developed over the years alongside the statutory and administrative changes we highlight in this brief. The field has developed a body of evidence-based approaches that can enable the overwhelming majority of students with disabilities to meet challenging state standards. *See generally* Thomas Hehir, New Directions in Special Education (2005).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

SAMUEL R. BAGENSTOS
625 S. State St.
Ann Arbor, Michigan 48109

ARLENE B. MAYERSON
DISABILITY RIGHTS EDUCATION & DEFENSE FUND, INC.
3075 Adeline St., Ste. 210
Berkeley, California 94703

RONALD M. HAGER
NATIONAL DISABILITY RIGHTS NETWORK
820 1st St., N.E., Ste. 740
Washington, D.C. 20002

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MARC A. HEARRON
Counsel of Record
LINDA A. ARNSBARGER
BRYAN J. LEITCH
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-1663
MHearron@mofo.com

Counsel for Amici Curiae